Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1548

OLD TOWN YACHT BASIN, INC.,
Petitioner,

v.

CITY OF ALEXANDRIA,
Respondent.

RESPONDENT'S SUPPLEMENTAL BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF VIRGINIA

CYRIL D. CALLEY
Deputy City Attorney
City of Alexandria, Virginia

J. HOWARD MIDDLETON, JR.
Assistant City Attorney
City of Alexandria, Virginia
320 King Street, Suite 200
Alexandria, Virginia 22314
(703) 750-6287

Attorneys for Respondent

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Pursuant to Rule 24, Rules of the Supreme Court of the United States, as amended, respondent is filing this Supplemental Brief in response to new contentions and serious allegations in petitioner's Reply.

STATEMENT IN RESPONSE TO PETITIONER'S REPLY BRIEF

I.

PETITIONER'S STATEMENTS WITH RESPECT TO RESPONDENT'S STATEMENT OF THE CASE ARE IMMATERIAL TO THE CONSTITUTIONAL ISSUE PRESENTED BY THE PETITION FOR A WRIT OF CERTIORARI.

Before discussing petitioner's new and serious allegations, brief comment should be made on statements in petitioner's Reply on page 2 continued through the

middle of page 3. Respondent submits that these statements are not material to the basic question presented in the petition herein which is whether the trial court violated the Fourteenth Amendment to the Constitution of the United States in ruling to exclude evidence on the issue of title in real estate for the reason that the tenant, petitioner herein, could not avoid its obligation to pay rent to its landlord, respondent herein, by setting up title in a third party, a general rule of landlord-tenant law followed in Virginia. (Resp. Brief, p. 4). As stated in respondent's Brief, the trial court's ruling is a matter of state law and nothing in the petition or in petitioner's Reply can create a question of general importance or of federal interest. (Resp. Brief, p. 8-9).[1]

[1] Certain misunderstandings should be clarified, however, with respect to respondent's Statement of the Case. Petitioner maintains that it paid rent only through November, 1971, rather than December, 1971, as represented in respondent's Brief (Pet. Reply, p. 2). At the trial, it had been agreed that November, 1971, was the last month for which petitioner had paid its rent to respondent. However, just prior to entry of the final order, it came to the attention of respondent that the final check for rent submitted by petitioner was for December, 1971, rather than November, 1971. Since this miscalculation affected only the amount of rent due and owing, rather than the legal issues in the case, counsel for respondent and petitioner agreed to note and initial on the final order a credit of one month's rent. The trial judge, in entering the final order, reprinted herein as Appendix A, consented to this agreement by counsel for both parties. Petitioner also states in its Reply that rent was paid under the lease only through March, 1969 (Pet. Reply, p. 3). The trial court held, however, that at the expiration of the original lease a month-to-month tenancy was created, and the record indicates that rent was paid pursuant to this arrangement into 1971.

II.

THE CONTENTIONS AND ALLEGATIONS CONCERNING THE TRIAL JUDGE'S PARTICIPATION IN THIS CASE SHOULD NOT BE CONSIDERED BECAUSE THIS ISSUE WAS NOT RAISED IN THE COURTS BELOW, AND, IN ANY EVENT, ARE UNFOUNDED AND BASED ON FALSE STATEMENTS IN THE ATTACHED AFFIDAVITS.

It has been held that a party cannot raise an issue in seeking certiorari that was not raised below. *Ellis* v. *Dixon*, 349 U.S. 458 (1955), *reh. den.* 350 U.S. 855. In light of this case respondent submits that the contentions and allegations in the second portion of petitioner's Reply on pages 3 and 4 should not be considered by this Court because they deal with an issue not heretofore raised in this case; namely, the issue of recusal of the trial judge.

In addition to the rule discussed above, we suggest that this case be decided on its merits and not extraneous matter. In fact, we would normally not respond to such matter. However, in this instance petitioner has made serious and false allegations which we cannot let stand unchallenged on the record, particularly as they are based on misleading statements in the Reply and factually untrue statements sworn to in affidavits attached to said Reply (Pet. Add. 1, 2 and 3). In its Reply, petitioner contends that the trial judge's former law firm was so involved in this case that he should have withdrawn prior to trial. Respondent submits that this is not so. The law firm referred to in the Reply served, for a time, as counsel to the respondent in the waterfront title litigation instituted by the United States Government. (Resp. Brief, p. 8). Prior to filing the instant case for unpaid rent, a member of said law firm reviewed the respondent's initial pleading for the sole purpose of determining whether it in any way

affected the title litigation in the federal courts. In addition, upon petitioner's filing a petition for removal to the United States District Court for the Eastern District of Virginia on March 4, 1974, a member of said law firm discussed with an assistant city attorney the city's response to said petition. The petition was dismissed and the case remanded to the state court on May 2, 1974. Other than these two reviews, the law firm had no interest in the instant case. Moreover, this law firm withdrew as counsel for the respondent in the title litigation for reasons wholly unrelated on July 26, 1974.

Furthermore, the trial judge, at a pre-trial conference in this case, informed counsel for both parties that his former law firm represented the respondent in the waterfront title litigation. At no time did any attorney for the petitioner ever request the trial judge to withdraw from this case. In addition, Judge Kent, while a member of said law firm, performed no work in either the waterfront title litigation or the instant case. The decision not to allow petitioner to litigate the title to the Alexandria waterfront in the instant case was made by Judge Wright at a pretrial hearing prior to the case being assigned to Judge Kent. This decision was in accord with a ruling of the Chief Judge in a related matter several months previous.

Even more serious than the unfounded implications in petitioner's Reply are the affidavits accompanying it. Respondent submits that it was impossible for one Kathryn B. Lang to have been shown papers relating to this case with the law firm's letterhead in the law offices of her attorney as she states in her affidavit (Pet. Add. 1). To the best of our knowledge and belief, there are no such papers. In addition, the memorandum attached to this affidavit (Pet. Add. 2) also contains false statements. The law firm referred to most definitely did not prepare this case for the respondent or receive remuneration therefore; and, Herman Lutz, Esq. never suggested that the trial judge recuse in this case. And still further, Ms. Lang's other attorney mentioned in the affidavit never requested that this same trial judge withdraw from another wholly unrelated case as she states in the affidavit (Pet. Add. 1). Indeed, Judge Wright was scheduled for that case at the outset. As to the affidavit by one John Gager (Pet. Add. 3), this too is false. Again, to the best of our knowledge and belief, there are no papers with the firm's letterhead related to respondent's suit for rent.

The fact that so many false statements have been sworn to in affidavits and submitted by an attorney to the Supreme Court of the United States is a matter of grave concern. In any event, however, these matters are extraneous to the basic issues before this Court and petitioner has not provided sufficient argument to compel reconsideration of the entire case.

CONCLUSION

For these reasons and for the reasons stated in respondent's Brief in Opposition, the petition for a Writ of Certiorari should be denied.

Respectfully submitted,

/s/ Cyril D. Calley
CYRIL D. CALLEY
Deputy City Attorney
City of Alexandria, Virginia

/s/ J. Howard Middleton, Jr.
J. HOWARD MIDDLETON, JR.
Assistant City Attorney
City of Alexandria, Virginia
320 King Street, Suite 200
Alexandria, Virginia 22314
(703) 750-6287

Attorneys for Respondent

APPENDIX A

VIRGINIA:

IN THE CIRCUIT COURT OF THE
CITY OF ALEXANDRIA

At Law No. 2449

CITY OF ALEXANDRIA, a municipal corporation of Virginia,
Plaintiff,

v.

OLD TOWN YACHT BASIN, INC.,
Defendant.

ORDER

THIS CAUSE came on to be heard on the 21st day of June 1974, upon the Motion for Judgment for Rent with Exhibits filed by plaintiff herein, upon the Grounds of Defense, Amended Grounds of Defense and Counterclaim filed by the defendant herein, upon the Answer to Counterclaim filed by plaintiff, upon a Request for Admission of Facts and Genuineness of Documents by plaintiff, upon the defendant's Response to said Request, upon a Request for Admission of Facts and Genuineness of Documents by defendant, upon the plaintiff's oral response in open Court to said Request, upon the Motion for Summary Judgment by plaintiff, upon the stipulations by plaintiff and defendant, and was argued by counsel.

AND IT APPEARING TO THE COURT that the lease dated March 29, 1956, and recorded in Deed Book 430 at page 27 among the land records of the City of Alexandria, Virginia, entered into by the defendant's predecessors and the plaintiff, and assigned to the defendant with consent to the assignment by the plaintiff,

expired on March 29, 1966; that negotiations toward a new rental agreement continued between plaintiff and defendant through June 1968; and that payments of rent in the amount of ONE DOLLAR ($1.00) per year were made thereafter on April 1, 1966, April 1, 1967, and May 13, 1968, and that such payments did not create an extension or renewal of the lease on a year to year basis;

AND IT FURTHER APPEARING TO THE COURT that on July 1, 1968, the plaintiff and defendant agreed to a tenancy from month to month at a rental in the sum of THREE HUNDRED DOLLARS ($300.00) per month by virtue of a letter dated June 17, 1968, marked plaintiff's Exhibit B and defendant's payment of the rent demanded commencing on July 1, 1968, and continuing through November 1971, all rent being current through November 1971; and that rent is due and owing the City for defendant's use and occupancy of the City owned land for December 1971 through January 1974, in the sum total of SEVEN THOUSAND EIGHT HUNDRED DOLLARS ($7,800.00);

AND IT FURTHER APPEARING TO THE COURT that the defendant Tenant is estopped to deny the plaintiff Landlord's title unless he claims title in himself, which the defendant has not done;

AND IT FURTHER APPEARING TO THE COURT that there is no question of fact to be determined by the jury; therefore, it is hereby

ADJUDGED, ORDERED and DECREED that the plaintiff's Motion for Summary Judgment for Rent in the sum total of SEVEN THOUSAND EIGHT HUNDRED DOLLARS ($7,800.00) is granted and the defendant's Counterclaim is dismissed. The court hereby notes that plaintiff and defendant agree that the sum of $300 is to be credited to the defendant's account.

AND IT IS SO ORDERED this 10th day of July 1974.

/s/ Donald Kent
Judge

Entered July 10, 1974, Common Law Bk. 14, page 169, J L D 23, page 93.

SEEN:

/s/ J. Howard Middleton, Jr.
J. HOWARD MIDDLETON, JR.
Assistant City Attorney
Counsel for Plaintiff

SEEN AND EXCEPTION HEREBY NOTED:

LUTZ & KAVALJIAN

/s/ Herman W. Lutz
HERMAN W. LUTZ
Counsel for Defendant

A COPY TESTE:

ALVIN W. FRINKS
Clerk

By: /s/ Alvin W. Frinks
Deputy Clerk